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In The
Supreme Court of the United States
October Term, 1991

HOWARD WYATT,
Petitioner,

vs.

BILL COLE and JOHN ROBBINS, II,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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Respondents attempt to justify qualified immunity for private parties by claiming that there are reasons analogous to those supporting government official immunity that also support private party immunity, but they fail to present any of these allegedly parallel justifications. *See* Respondents' Brief ("Res. Br.") at 11-14. Nor do respondents address any of the reasons that petitioner set forth in his opening brief explaining why the rationales traditionally offered for immunity for government officials do not apply here. Instead, respondents offer only one justification for exempting private parties from liability under section 1983, and even that justification is not supported by the facts of this case.¹

¹ Most of respondents' brief has nothing to do with the issue on which review was granted, whether private parties are entitled to qualified immunity under section 1983. Respondents' discussion of *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (cont'd)

Respondents simply state that a failure to provide an immunity will "engender disrespect for the law." Res. Br. at 14. According to respondents, without qualified immunity, citizens would be discouraged from using the law, and they should be able to take comfort in using the law to preserve their rights, including their rights to protect their property. Res. Br. at 12. Respondents portray this case as one involving a party who unknowingly uses a law that is later invalidated and urge that to fail to grant them immunity here "would not only ignore logic but undermine the private person's faith in the legal system." Res. Br. at 14.

Respondents' approach suffers from two insurmountable flaws. First, respondents do not refute petitioner's position that a functional approach to immunities, coupled with the differences between the functions of a government official and a private party, precludes any immunity for private parties. Nowhere do respondents attempt to reconcile the vastly different roles played by these two categories of potential section 1983 defendants, nor do they explain why the concerns identified in every section 1983 immunity opinion from this Court have nothing to do with immunity for private parties. Indeed, as our opening brief argued, the lack of a common law analogue, the purposes of section 1983, and the policy reasons supporting the doctrine of immunity all point to one inescapable conclusion: private parties who initiate state action for personal gain are not entitled to qualified immunity.

Second, respondents' "innocent party" argument has nothing to do with this case. Unlike the private parties who do no more than act at the state's behest, respondents initiated the unconstitutional state action for their personal gain.² Moreover, respon-

(1982), and subsequent cases, relates to the standard of liability under section 1983, not the issue of immunity. Similarly, pages 21-28 of respondents' brief argues that respondents met the test for qualified immunity, an issue that petitioner has chosen not to raise in this Court.

² Compare e.g., *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 721 (10th Cir. 1988) (immunity granted to private parties who thought contract with the government required them to engage in conduct which then resulted in (cont'd)

dents did not simply file a lawsuit, but they sought an extraordinary writ for immediate relief without affording the minimal due process elements of notice and the opportunity to be heard, see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and in doing so violated petitioner's constitutional rights. It is with this factual background that the question presented comes before the Court, and it is these facts that compel the conclusion that the balance of policy considerations weighs decisively against a grant of immunity for respondents.

Finally, under respondents' analysis of this case, the winner of a lawsuit righting constitutional wrongs is not entitled to compensation for damages caused by private parties who acted for personal gain. They take this position despite the fact that section 1983 was intended to encourage those who have been deprived of constitutional rights to seek a remedy. Because there are no policy reasons of the kind applicable to state officials that apply here, and because all of the relevant policy considerations militate against a grant of immunity, the Fifth Circuit erred in granting respondents qualified immunity.

CONCLUSION

For the reasons presented in petitioner's brief and above, the judgment should be reversed and remanded for a determination of petitioner's damages proximately caused by respondents' initiation of the unconstitutional replevin procedure.

constitutional harm), with *Howerton v. Gabica*, 708 F.2d 380, 384-85 (9th Cir. 1983) (private party who sought police action through extraordinary measures for private gain not entitled to immunity); but see *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989) (contractor denied qualified immunity in blanket, unreasoned application of circuit precedent, even though private party acted at state's behest); *Jones v. Preuit & Mauldin*, 851 F.2d 1321, 1324-25 (11th Cir. 1988) (*en banc*) (where majority, like respondents here, rejected policy reasons set forth in dissents).

Respectfully submitted,

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